IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. OF L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE, and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

Brief Amicus Curiae of Wisconsin Manufacturers' Association, the Northeast Wisconsin Industrial Association, and the Associated Industries of Oshkosh.

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The Wisconsin Manufacturers' Association, the Northeast Wisconsin Industrial Association, and the Associated Industries of Oshkosh respectfully submit this brief as amicus curiae. These Associations—organizations whose members are employers—file this brief in support of an order issued by the Wisconsin Employment Relations Board, which was approved and enforced by the Wisconsin Supreme Court.

SCOPE OF BRIEF

This brief will be concerned solely with the question as to whether or not the order of the Wisconsin Employment Relations Board, as construed by the Wisconsin Supreme Court, prohibiting the Petitioners from "engaging in concerted activities to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours" infringes on rights guaranteed employees by the National Labor Relations Act.

These Associations contend that neither the National Labor Relations Act of 1935 nor the National Labor Relations Act as amended by the Labor-Management Relations Act of 1947 grant federal protection to the type of activities condemned by the order here under review. It is admitted that, if the order of the Wisconsin Employment Relations Board denies to Petitioners the exercise of rights guaranteed by federal law, the order should not be enforced.

ISSUE

The activities prohibited by the order of the State Board involve a concerted union-sponsored program of repeated absences during working hours for short periods without notice to or consent by the employer. The announced purpose of the absences was to attend union meetings. The admitted objective in calling union meetings during working hours was to interfere with production. These activities, for purposes of brevity, will be referred to hereafter as "unauthorized absences."

The order of the State Board, as construed by the Supreme Court, prohibits Petitioners "from engaging

in concerted effort to interfere with production *by doing the acts instantly involved.*" (Emphasis supplied) This Court has held that:

> "Since Wisconsin has applied . . . only parts of the state Act, the conflict with the policy or mandate of the federal Act must be found in those parts." (*Allen-Bradley Local 1111, et al. v. Wisconsin Employment Relations Board, et al.* 315 U. S. 740, p. 750)

This Court also has recognized that the highest court of the state:

> " . . . has of course, the final say concerning the meaning of a Wisconsin law and the scope of administrative orders made under it." (*Hotel & Restaurant Employees International Alliance, Local No. 122, et al v. Wisconsin Employment Relations Board, et al.*, 315 U. S. 437, p. 440)

Hence, the narrow issue presented is whether or not these unauthorized absences constitute an activity protected by the National Labor Relations Act.

ARGUMENT

Where Intra-State Activities are Concerned, the Reserved Police Power of the State Will Be Sustained Unless There is a Clear Conflict With the Exercise of Constitutional Federal Power.

This employer is not an instrument of commerce and is not engaged directly in interstate or foreign commerce. The activities here involved were clearly of a character subject to state regulation. The subject matter of the state's order:

> " . . . is not so 'intimately blended and intertwined with responsibilities of the national government'

that its nature alone raises an inference of exclusion. Cf. Hines v. Davidowitz, 312 U. S. 52, 66." *(Bethlehem Steel Company, et al. v. New York State Labor Relations Board,* 330 U. S. 767, p. 772).

By the prohibition of the activities here involved, in the absence of conflicting federal legislation, the state did not impinge on constitutionally-granted federal power.

This Court, in a case involving another section of the Wisconsin Employment Peace Act dealing with picketing, violence, etc., clearly enunciated this principle when it stated:

> "We agree with the statement of the United States as amicus curiae that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity." *(Allen-Bradley case, supra.,* p. 748)

Congress is under no constitutional compulsion to regulate interstate commerce in a manner which embraces all of the evils in a particular field within its reach. *(National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301, U. S. 1, p. 46). Where both state and federal governments have the power to legislate in a particular field and the federal legislation is of limited scope, the federal intent to exclude state power must clearly be manifested. *(Allen-Bradley case, supra,* pp. 748-749). The National Labor Relations Act is of limited scope, leaving unregulated "other closely related matters." *(Bethlehem Steel case, supra,* p. 773)

This Court has defined the scope of the Wagner Act as follows:

> "Sec. 7 of the federal Act guarantees labor its 'fundamental right' (National Labor Relations

> Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 33) to self-organization and collective bargaining. Sec. 8 affords employees protection against unfair labor practices of employers including employer interference with the rights secured by Sec. 7. Sec. 9 affords machinery for providing appropriate collective bargaining units. And Sec. 10 grants the federal Board 'exclusive' power of enforcement." (*Allen-Bradley case, supra,* p. 750)

These rights were not expanded in any sense material to these proceedings in the Labor-Management Relations Act of 1947.

It already has been pointed out that the order of the State Board, as construed by the Wisconsin Supreme Court, has limited application. The assumption of a broader application than is warranted under the Supreme Court's decision is not a proper ground for setting aside the order. This Court, in referring to the rights guaranteed under the federal statute, has stated:

> "It is not sufficient, however, to show that the State Act might be so construed and applied as to dilute, impair, or defeat those rights." (*Allen-Bradley case, supra,* p. 750)

It is submitted that the activities enjoined by the state order, while they are admittedly concerted activities, did not impair the rights guaranteed by the federal statute to employees "to self-organization and collective bargaining." As will be pointed out in greater detail later, all concerted activities are not protected by the federal statutes. The right of employees to indulge in a program of concerted unauthorized absences is not fundamental to the enjoyment of the rights protected by the federal statutes. There is nothing in the state's order which affects the status of employees or forfeits collective bar-

gaining rights. The collective bargaining activities encouraged by Congress remain open to the Petitioners. As this Court stated in the *Allen-Bradley case*:

> "And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy. If the order of the state Board affected the status of the employees or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise. But since no such right is affected, we conclude that this case is not basically different from the common situation where a State takes steps to prevent breaches of the peace in connection with labor disputes. Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together, the order of the state Board must be sustained under the rule which has long obtained in this Court. See Sinnot v. Davenport, 22 How. 227, 243." (*Allen-Bradley case, supra*, pp. 750-751)

We submit that the same rule applies to the activities prohibited by the state in this case.

It must be demonstrated, and not merely assumed, that the exercise of the right to bargain collectively, as guaranteed in the federal law, requires that employees have the right to undertake a concerted program of repeated unauthorized absences. The conflict between the State Board's order and the federal law:

> ". . . should be so direct and positive so that the two acts could not be reconciled or consistently stand together." (*Sinnot v. Davenport*, 22 How. 227, 243)

This situation is not similar to that involved in the *Hill v. Florida case*. This Court construed the legislation, ruled unconstitutional in that case, in the following language:

> "It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida." (*Leo H. Hill, et al, v. State of Florida, et al.*, 325 U.S. 538. P. 541)

The order of the Wisconsin Board in this case has not been so construed and is not susceptible of such a construction. The record in this case shows that the union could and did, through its officers and agents, function as collective bargaining representative. There is nothing in the order to prevent it from continuing to do so.

This case, unlike the *Bethlehem Steel case*, presents no possibility of conflict between federal and state agencies in the administration of similar state and federal legislation. The activities of the type banned by the State Board are neither specifically protected nor denounced by federal law. The amendments contained in the Labor-Management Relations Act of 1947 do not give an employer or an employee the right to file an unfair labor practice charge with the National Labor Relations Board complaining of such activities, unless other factors are involved. There is no provision in the federal law comparable to the one on which the state order was based. Hence, there is no possibility of a conflict in administration.

Federal Acts Cannot Be Construed as Giving Protection to All Concerted Activities.

The provisions of Section 7 in the federal act did not create new rights, but provided federal protection for existing rights. This Court, in commenting on the specific provisions contained in Section 7 of the Wagner Act, stated:

> "Neither this provision, nor any other provision of the Act, can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 33, 34, we observed that this right is a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has 'to organize its business and select its own officers and agents';" (*Amalgamated Utility Workers, et al. v. Consolidated Edison Co. of N. Y., et al.*, 309 U. S. 261, p. 263)

It hardly can be contended that employees, prior to the passage of the Wagner Act, had the fundamental right to indulge in the activities condemned by the order in this case.

The right of employees to bargain through representatives and to engage in concerted activities for their mutual aid and protection, as guaranteed by federal law, assumes that such activities must be exercised in such a manner as will not impair the fundamental rights of others. The courts, in many instances, while construing and applying this legislation, have indicated clearly that the mere fact that the particular activity is indulged in by two or more employees on a concerted basis does not make an otherwise unlawful act lawful.

This Court has stated:

> "The conduct thus protected is *lawful conduct*. Congress also recognized the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands. Section 13 provides that nothing in the Act 'shall be construed so as to interfere with or impede or diminish in any way the right to strike.' But this recognition of 'the right to strike' plainly contemplates a lawful strike—the exercise of the unquestioned right to quit work." *National Labor Relations Board v. Fansteel Metallurgical Corporation*, 306 U. S. 240, pp. 255-256). (Emphasis supplied)

The order of the Board in this particular case does not deprive Petitioners of "the exercise of the unquestioned right to quit work." Furthermore, the activities were found to be *unlawful* under the law of the State of Wisconsin.

While employees have the unquestioned right to strike by leaving their employment to enforce their demands, the legislative protection granted to this right in the National Labor Relations Act did not deprive the employer of his right to continue operating his business if he could secure other employees. If the activities involved in this case were protected activities under the federal law, there is no way for this employer to overcome the adverse effect on production caused by the periodic unauthorized absences. The employer is just as effectively denied the use of his property during these absences as if the employees remain on the premises but refuse to perform any work. If these unauthorized absences are protected activities, the employer cannot discharge the employees and replace them with new em-

ployees. The result is the same as if the employees engage in a sitdown strike. This Court, in the *Fansteel case*, made it clear that such activities were not protected activities under the federal act. The Court, in referring to the sitdown strike, stated that:

> "This was not the exercise of 'the right to strike' to which the Act referred. *It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful.* It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion, they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve." (*Fansteel case, supra.* Pp. 256-257) (Emphasis supplied)

Moreover, this Court has consistently held that employees engaging in a *legal* strike, not caused by unfair labor practices, are not protected in these activities to the extent of having an absolute right to their jobs whenever they cease their striking. This ruling recognized that, while the employees had a right to strike, the employer had an equal right to conduct his business by employing other employees if they were available. This rule was laid down in the *Mackay Radio case*, wherein this Court stated:

> "Although Section 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede, or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to dis-

charge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them." (*National Labor Relations Board v. Mackay Radio & Telegraph Company*, 304 U.S. 333. Pp. 345-346)

An employee indulging in activities unlawful by state standards should be in no better position.

The Fourth Circuit Court of Appeals, in a more recent case, applying the principle established in the *Fansteel case* to a situation involving another type of concerted activity, held that, when employees:

> "... refuse to obey the rules laid down by a law-abiding management for the conduct of the business, they may be discharged and their places may be permanently filled." (*Home Beneficial Life Insurance Company, Inc. v. National Labor Relations Board*, 159 F. 2d 280. P. 284)

If an employee can be discharged for engaging in a type of concerted activity not protected by the federal law, there can be no conflict between state and federal power where the state restrains employees from indulging in such activities. As this Court stated in the *Bethlehem Steel case*, supra:

> "Where it (The Congress) leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state." (P. 773)

The Petitioners in this case seem to contend that, so long as employees act in concert, they are protected under the National Labor Relations Act from discipline by

their employer and from restraint imposed by the state. The First Circuit Court of Appeals, in the *Draper Corporation case*, most aptly negated this contention when it stated:

> "The purpose of the Act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace." (*National Labor Relations Board v. Draper Corporation*, 145 F. 2d 199. P. 203)

If every type of concerted activity were protected by federal law, then local law enforcement officers would be helpless to prevent the holding of a union meeting in the middle of a busy thoroughfare, or for that matter, a state court to grant redress to a property owner whose property had been used without his approval for such a purpose. The courts have refused to come to such an absurd conclusion. This Court rather brusquely reminded the National Labor Relations Board of the necessity of administering the statute in a manner which gives recognition to the rights of others.

> "Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." (*Southern Steamship Company v. National Labor Relations Board, et al.*, 316 U.S. 31. P. 47)

This Court, in that case, held that mutiny on the high seas was not a type of concerted action protected by the Wagner Act, and that such activities were not essential to the enjoyment of the rights guaranteed employees by that law. The type of activities banned by the state order

in this case are no more necessary to the enjoyment of the rights guaranteed by the National Labor Relations Act than is the right to strike aboard ship in violation of the Federal Mutiny Act. The Court, in the *Southern Steamship case*, supra, stated:

> "... nothing that we have said would prevent the union from striking, picketing or resorting to any other means of self-help, so long as the time and place it chooses do not come within the express prohibition of Congress." (P. 49)

Likewise in this case, the employees are not prohibited from striking or indulging in other self-help which does not come within the express prohibition of the state statute.

It may be argued that the condemned activity in the *Southern Steamship case* was unlawful because of Congressional enactment and that the same reasoning does not apply to activities declared unlawful by a state. This Court has not made that distinction. In the *Fansteel case, supra*, where the employer admittedly had violated the Wagner Act, this Court, in refusing to reinstate certain employees who had violated state law, said:

> "The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit *tortious acts* or to protect them from the appropriate consequences of *unlawful conduct*." (P. 258). (Emphasis supplied)

The unlawful conduct in that case was the forceful seizure of the employer's property and the failure to comply with an order of a state court. The "tortious acts" and "unlawful conduct" were not given legal status

under the federal law simply because employees engaged in such activities in concert for their own mutual aid and protection.

Other types of concerted activities which have been held not to be within the protection of the National Labor Relations Act are minority strikes (*Draper Corp., supra*, and *Brashear Freight Lines v. National Labor Relations Board*, 119 F. 2d 379); a strike in violation of a collective bargaining agreement (*National Labor Relations Board v. Columbian Enameling and Stamping Company, Inc.*, 306 U.S. 292); a strike prosecuted to compel an employer to grant an illegal wage increase (*American News Company, Inc.*, 55 N.L.R.B., 1302); a strike conducted in such a manner as to deny the employer the use of his plant (*National Labor Relations Board v. Indiana Desk Company*, 149 F. 2d 987); etc.

The foregoing decisions logically recognize that actions which impair the personal and property rights of others, even though done in concert, whether unlawful under state or federal law, are not within the protection of the National Labor Relations Act.

The Activities Banned by the State Board Order Are Not Protected by the National Labor Relations Act.

The highest court in the State of Wisconsin has found that these unauthorized absences were an unlawful activity under state law. It is admitted that the employees in leaving their employment did not intend to strike. Section 3 of the National Labor Relations Act defines the term "employee" as including "any individual whose work has ceased as a consequence of, or in connection

with, any current labor dispute, or because of any unfair labor practice." This definition lends color to Section 13, wherein "the right to strike" is preserved. The employees in this case did not "cease work." They, as directed by Petitioners, "took the day off." Petitioners are not prohibited from striking by the order.

It already has been pointed out that all types of concerted activities have not been recognized as within the range of the activities protected by Section 7. The remaining issue is whether or not this particular activity—namely, this series of concerted unauthorized absences—constitutes a protected activity.

The question put otherwise is: Does the National Labor Relations Act give employees the right to remain in the active employ of an employer under conditions unilaterally determined by the employees? This question does not involve the issue as to whether or not the employees may go on strike by quitting their employment in support of their demand for a change in wages, hours, or working conditions. The Petitioners in this case admittedly, and as found by the Supreme Court of the State of Wisconsin, did not go out on strike.

The Eighth Circuit Court of Appeals, in the *Montgomery Ward case,* stated the rule aptly in the following words:

> "While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work." (*National Labor Relations Board v. Montgomery Ward & Co., Inc.,* 157 F. 2d 486. P. 496)

It is submitted that there is little difference between a situation where an employee decides for himself what tasks he shall perform and one where an employee decides when he shall perform them. As stated in the *Howie Beneficial Life Insurance Company case, supra,* when employees:

> ". . . refuse to obey the rules laid down by a law-abiding management for the conduct of the business, they may be discharged and their places may be permanently filled." (P. 284)

If the employer has the right to discharge in such cases, then obviously, the activity is not a protected activity under the federal act.

The Seventh Circuit Court of Appeals applied the same line of reasoning in a situation where a group of employees refused to work the hours prescribed by the employer. The Court stated:

> "We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." (*C. G. Conn, Ltd. v. National Labor Relations Board,* 108F. 2d 390. P. 397)

(See also *National Labor Relations Board v. Mount Clemens Pottery Company,* 147 F. 2d 262)

The Third Circuit Court of Appeals, following the line established in the *Conn case, supra,* stated:

> "Employees cannot insist that their demands be met in the middle of a working day, when the employer has promised to deal with them as a group at the end of the day." *(National Labor Relations Board v. Condenser Corporation of America, et al.*, 128 F. 2d 67. P. 77)

In the instant case, the employees likewise sought to determine for themselves the hours of work.

The foregoing cases recognize the industrial realities in this type of situation. If two or more employees, acting in concert, have a right under federal law to determine unilaterally the hours during which they shall remain on the job, it will become next to impossible to operate an industrial enterprise. If such unauthorized absences are a type of protected activity under the federal statute, then two employees at a time, or all of them, may take time off whenever they choose, provided such action may be construed as being for the employees' "mutual aid and protection." The union could refine this technique and simply call out the employees in a key department, which would necessitate the laying off of the employees in other departments, and thus shut down the whole plant for short periods. If this is a protected activity, then the employer is defenseless in the face of these tactics. He cannot discharge or discipline the offending employees, nor can he replace them with other employees.

There is nothing in the National Labor Relations Act to indicate that Congress intended to transfer the responsibility for directing the working force from the management selected by the stockholders to the bargaining agent selected by the employees. Nor could Congress constitutionally have done so. Had Congress considered that such an arrangement would encourage the free flow

of commerce, Congress would undoubtedly have used language other than that employed in Section 7. The contention of the union in this case is really to the effect that what admittedly constituted an act of insubordination before the passage of the National Labor Relations Act became the right of employees, free from the hazard of discipline or regulation, after the passage of the Act. It is noteworthy to point out that the Petitioners do not concede that this employer had the right to discipline employees indulging in such unauthorized absences. If that be the case, then Congress has in effect changed our whole industrial structure by the mere passage of a law guaranteeing to employees the right to bargain collectively through a labor union. The decisions of this Court and other federal courts referred to previously indicate the absurdity of such a contention.

Congress, By the Passage of the National Labor Relations Act, Has Not Preempted the Entire Field of Regulation of Industrial Strife.

In the original National Labor Relations Act, and in the Labor-Management Relations Act of 1947, the Congressional policy was stated to be:

> "... eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining ..." (Section 1)

Both of these laws listed in Section 8 specific unfair labor practices which were to be eliminated, and authorized the National Labor Relations Board to undertake certain means to eliminate the specified unfair labor practices. Congress was primarily concerned with *eliminating* the causes which *lead* to industrial strife.

> "Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act . . ." (*Consolidated Edison Company of New York, Inc., et al. v. National Labor Relations Board, et al.*, 305 U.S. 197, P. 222)

The very machinery provided in the National Labor Relations Act indicates that Congress could not have intended to rely on this legislation to *terminate* strikes which were hampering commerce, except in a few specified instances included in the Labor-Management Relations Act. Further, it is clear that Congress intended to leave to the states the maintenance of law and order and the protection of personal and property rights which may become involved as a result of an industrial dispute.

We have already seen where this Court, in the *Fansteel case*, recognized that unlawful activities incident to a strike were not a protected activity under the National Labor Relations Act. Congress confirmed this decision by an amendment contained in Section 13 of Title 1 of the Labor-Management Relations Act. This section, as now constituted, reads as follows:

> "Nothing *in this Act*, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to *affect the limitations or qualifications on that right.*" (Emphasis supplied)

Had Congress intended to exclude the states from the regulation of industrial disputes, it would not have specified "nothing in this Act." The right of the states to impose additional limitations is recognized by the language "or to affect the limitations or qualifications on that right." Unless Congress intended to leave to the states the right to act in this field, this language is purposeless, since other language in this section already re-

fers to the limitations contained in the Labor-Management Relations Act. The Conference Report of the House of Representatives stated that this language recognizes:

> "... that the right to strike is not an unlimited and unqualified right." (*House Report*, 510, Eightieth Congress. P. 59)

Hence, even assuming the banned activities were considered a form of strike, it is submitted that the Board's order is no more than a reasonable limitation within the purview of Section 13 of the Labor-Management Relations Act.

We have already pointed out that the order of the State Board can be reconciled with the rights guaranteed to employees under federal law. In view of the fact that the right to indulge in unauthorized absences is not essential to the enjoyment of the rights of self-organization and bargaining through representatives as protected in the federal statute, the requirement that the inconsistency with federal law must be clear is not met. (*Maurer v. Hamilton*, 309 U.S. 598) Congress, having determined to occupy a limited field in the regulation of industrial strife, the implication is that the state may regulate activities not within the orbit of the federal legislation. This Court has stated this rule in the following language:

> "The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State." (*Atchison Ry. v. Railroad Comm.*, 283 U.S. 380. Pp. 392-393).

If engaging in unauthorized absences is not protected by federal law, it then must follow that the National Labor Relations Act cannot justify the nullification of the State Board's order.

There Is No Conflict Between the State Board's Order and the General Policies Enunciated in the Federal Labor Law.

The following statement of Congressional policy is contained as Section 1 in both the National Labor Relations Act of 1935 and the amendments thereto contained in the Labor-Management Relations Act of 1947:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (Section 1)

In the Labor-Management Relations Act of 1947, the Congress found that:

> "Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." (Section 1)

The Wisconsin Employment Peace Act provides in part as follows:

> "Negotiation of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation, an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing without *intimidation* or coercion from any source." (Section 111.01)

Section 111.04 of the state statute defines "rights of employees" as follows:

> "Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual laid or protection; and such employees shall also have the right to refrain from any or all of such activities."

The foregoing language is almost identical with that contained in Section 7 of the Labor-Management Relations Act. Both the federal Congress and the state legislature were concerned with removing obstructions to continued production and the free flow of commerce. Both sought to accomplish this end by defining certain acts as unlawful and authorizing an administrative agency to prevent such unfair labor practices. The National Labor Relations Act of 1935 sought to eliminate only certain practices committed by employers. The Wisconsin Employment Peace Act of 1939 sought to protect the same employee rights, but went beyond the scope of the Wagner Act and denounced certain coercive employee activities as unfair labor practices. The Labor-Management Relations Act of 1947 also denounced

certain union activities as unfair labor practices. The broad policies of the two federal statutes and the state law are identical; that is, to provide peaceful means for settling labor disputes. This Court, in the *Fansteel case*, defined the fundamental policy of the Wagner Act in the following language:

> "We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. *On the contrary, the purpose of the act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights.*" (*Fansteel case, supra.* Pp. 257-258). (Emphasis supplied)

There is nothing in the record in this case to indicate that this employer has invaded employee rights. There is ample evidence that the activities banned by the State Board created obstructions to the free flow of commerce. While Congress did not seek to control the particular activity here involved, certainly the state, by removing such an obstruction, is not violating the broad policies of the federal statutes. This Court has held that:

> " . . . . the fundamental purpose of the Act (Wagner) is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife." (*Consolidated Edison Company case, supra.* P. 237)

The prohibition of the activities involved in this case is consonant with the federal policy of removing obstructions to interstate commerce.

CONCLUSION

The narrow issue presented by this brief is whether or not the order of the Wisconsin Employment Relations Board, restraining Petitioners from committing certain acts herein described as unauthorized absences, denies to Petitioners the right to exercise the rights guaranteed by the National Labor Relations Act. Congress, in the National Labor Relations Act, exercised its power to regulate interstate commerce to a limited extent. This being the case, it cannot fairly be implied that Congress intended to preempt the whole field of labor relations. The guarantee to employees of the right to engage in concerted activities has not been construed to legalize all concerted activities. It is not necessary that employees have the right to engage in the unauthorized absences condemned by the State Board's order in order to enjoy the rights as guaranteed by the federal law. There being no clear conflict between the State Board's order and Section 7 of the National Labor Relations Act, the State Board's order should stand. Furthermore, the banning of these unauthorized absences is consonant with the broad federal policy of removing obstructions to interstate commerce. Section 13 of the Labor-Management Relations Act of 1947 negates any inference that Congress intended to remove the states completely from the field of regulating industrial strife.

Wherefore, it is respectfully submitted that the decision of the Supreme Court of the State of Wisconsin should be sustained.

Respectfully submitted,

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